Present: Bertram C.J., Ennis J., and Jayewardene A.J. 1924.

NOORBHAI & CO. *v.* KARUPPEN CHETTY

426—D. C. Colombo, 8,290

Contract of sale at a fixed price—After price of article had gone down, pretension by buyer that the contract price was less—After price of article had gone up, repudiation of contract by seller—Action for damages.

The defendant agreed to deliver to plaintiffs 1,500 bags of sugar at Rs. 37.50 a bag. The price of sugar then went down, and the plaintiffs pretended that the contract price was Rs. 34 a bag, and not Rs. 37.50. The defendant repudiated the suggestion, and held the plaintiffs to the bargain. The price of sugar then went up, and the defendant thereupon asserted that the contract no longer subsisted, and, notwithstanding the protests of the plaintiffs, disposed of the goods. The plaintiffs claimed Rs. 17,250 damages for breach of contract.

The defendant set up the defence that there was no contract, and in the alternative that if there were a contract that the plaintiffs had repudiated it and were estopped from claiming the benefit of it.

Held (*Per* ENNIS J. and JAYEWARDENE A.J., *dissentiente* BERTRAM C.J.) that there was no binding contract, and even if there was such a contract, it had been rescinded.

BERTRAM C.J.—In spite of the fact that plaintiffs have sought to repudiate the contract, yet if they are held to it by the other party, they may insist on its performance.

THE facts are set out in the judgment.

Drieberg, K.C. (with him *Hayley* and *Choksy*), for plaintiffs, appellants.

Elliott, K.C. (with him *Samarawickreme*), for defendant, respondent.

Cur. adv. vult.

July 15, 1924. BERTRAM C.J.—

In this case we have to determine the rights of the parties to a sugar contract. The legal issues we have to determine are unfortunately clouded with moral considerations. The buyers, after the contract had been concluded, found that the price of sugar was going down. They thereupon unscrupulously and dishonestly

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pretended that they had bought at a lower figure than the actual contract price. The seller repudiated the suggestion, and held him to his bargain. The price of sugar then went up. The seller thereupon, with equal unscrupulousness and dishonesty, pretended that the contract no longer subsisted, and, notwithstanding the protests of the buyers, disposed of the goods which he had already sold. These, as I see the case, are the simple facts. I cannot see that there can be any reasonable doubt as to the legal result of these facts. I think that the legal position is demonstrably clear, if the story is considered in stages.

The first stage relates to the original negotiations, and the contract said to have been concluded. The first question is, was a contract concluded ? The facts are as follows: The first plaintiff, who was the managing partner of the firm of T. A. J. Noorbhai & Co., in February, 1923, wanted to buy about 2,000 bags of sugar, and asked a broker, Candappa, to arrange about it. Candappa went to the defendant, and after some negotiations obtained the offer of 1,500 bags (or 150 tons) at Rs. 37.50 per bag. The broker, as I understand the facts, reported this offer to his principal (whom I will refer to as the buyers). The latter approved of the proposal, and gave the broker a cheque for Rs. 7,500, which was an advance or part payment at the rate of Rs. 5 per bag, and instructed him to conclude the bargain.

It is not definitely stated that the cheque was written out after the offer was reported. The seller speaks in one place as though the broker had the cheque with him while they were negotiating, but I think it is clear that the cheque was written out after the offer was reported, as, till this was done, the buyers did not know how many bags they could secure. But nothing seems to me to turn on this point.

On receipt of the cheque the seller drew up a formal contract note, setting out the terms of the bargain, and gave it to the broker. The broker took it to his principal, who instructed him to take it back and get a formal clause added that: "Delivery will be given by weighing without slackage and moisture as usual." This was done. The contract note was dated February 16, 1923. The additional clause appears to have been added on February 19. Taking these to be the facts so far, the question arises, was there a concluded contract ? I do not see how there can be any doubt. There is not only a contract, but a mutually enforceable contract. There is no question that the broker had authority to conclude the contract and to bind his principal, the buyers. There is no question that a part payment was made on account of the contract. There is no question that the seller handed to the broker, on behalf of the latter's principal, a signed memorandum of all the material terms of the contract. The only suggestion to the contrary which can arise at this stage is based upon the fact that the buyers never themselves

signed a contract note although they were requested so to do by their broker, and although such a contract note was expected by the seller. But this point appears to me to be unsubstantial. It was not suggested that there was any mercantile custom under which no bargain was deemed to be concluded until the parties had exchanged written notes. All that the seller says is: "That it is custom to expect another similar document from the other side when a sale is effected." The broker says: "Some firms give a written contract, and some do not. Plaintiffs have been giving a return contract to some people. Defendant wanted a written contract." But the law on the subject is clear. See the judgment of Lord Westbury in *Chinnock v. Marchioness of Ely* [1]: "I entirely accept the doctrine that if there had been a final agreement, and the terms of it are evidenced in a manner to satisfy the Statute of Frauds, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties. As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged, or his agent lawfully authorized, there exist all the materials which this Court requires to make a legally binding contract. But if to a proposal or offer an assent be given, subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation." It appears to me clear that the facts in this case cannot be brought within the exception of the final sentence. This is merely a case in which, when the contract has been concluded, one of the parties asks for a formal note of it. See on this question *Winn v. Bull* [2]; *Rossiter v. Miller* [3]; the principle is conveniently stated in the article on Contract in *Halsbury's Laws of England, VII., p. 722:* "Where there is a definite acceptance of an offer, the fact that it is accompanied by a statement that the acceptor desires that the arrangement should be put into a more formal shape does not relieve either party from his liability under the contract." It must be taken then that, at this point in the facts so far disclosed, there was a concluded contract. This brings us to the second stage of the story.

The second stage of the story is a dishonest attempt on the part of the buyers to evade the most important term of the contract, namely, the price agreed upon. On February 19 their broker brought back the contract note with the clause fully added. The broker requested them to make out a return contract to be taken to the seller, and he was told to come back the following day. He did so, and he was then told that the price of sugar had gone down,

[1] *4 De G. J. & Sm. 638.*

[2] *(1877) 7 Ch. D. 28.*

[3] *(1878) 3 A. C. 1124; 5 Ch D. 648.*

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and he was asked to go back to the seller and try to arrange a lower price. At the same time the buyers wrote the following letter to the seller:—

S. P. L. R. Karuppen Chetty, Esq., Colombo. February 20, 1923.

DEAR SIR,—WITH reference to the contract purchasing from you 1,500 bags Java sugar (February, March, and April shipments of 500 bags monthly) at Rs. 34 per bag *ex* bond through broker, Candappa, we have to inform you that although we made an advance of Rs. 7,500 by C. B. cheque dated February 16, 1923, towards the contract, we have not yet received the contract signed by you.

We would, therefore, ask you to send the contract duly signed by you without any further delay to avoid unnecessary steps being taken on the matter.

Yours faithfully,
T. A. J. NOORBHAI & Co.

P.S.—We are daily inquiring from broker *re* delay of the contract, and in reply he says that he was told by your manager that you are gone to estate and expected to-day. Therefore we write you now this letter.

There is no question that this letter is thoroughly dishonest. It contains an incidental suggestion that the price was not Rs. 37.50 per bag. but Rs. 34 per bag, and it pretends that no written contract had ever been received. The statement in the postscript: "We are daily inquiring from broker *re* delay of the contract" is a deliberate falsehood. The seller replied immediately by a letter dated February 21, saying that the contract had been duly signed and handed over to the broker; that a cheque for Rs. 7,500 had been paid in advance; that it would be found on reference to the contract that the price was Rs. 37.50 per bag; and that the writer was expecting a return contract duly signed.

It would appear that before this letter was received, the buyers, in the hope of making their dishonest position more secure, had consulted a proctor and instructed that proctor to write a second letter to the seller referring to the first, and demanding that the contract should be returned forthwith. It will be observed that it is not now stated that a contract had never been received, but that the contract, which had been sent back for the insertion of the additional clause, had not been returned. This letter of the proctor was, apparently, sent on before the seller's letter of February 21 had been communicated to him. The seller was not unnaturally incensed by this second letter, and himself put the matter into the hands of his own proctor, who, on February 24, wrote a peremptory letter to the buyers' proctor repudiating the assertion that the contract had never been received, and that the price agreed upon was Rs. 34 per bag. He charged the buyers with attempting to cut down the price because the market had gone down, and formally held him to his bargain saying that: "If the balance value is not paid

and delivery taken of the goods by your clients as arranged, the same will be sold at your clients' risk, and the losses and damages, if any, will be recovered from your clients." To this the buyers' solicitor replied by a letter dated March 1. This letter does not challenge the statement twice repeated on behalf of the seller in the letters of February 21 and February 24 that the contract price was Rs. 37.50 per bag, though it made no formal admission of this fact. It merely drew attention to the fact that sugar had gone high in price, and that the day's market price was Rs. 40 per bag. The buyers did in fact accept the situation, as is shown by the fact that they resold the sugar to a third party by endorsing over the actual contract note. I see no reason to question the *bona fide* of this transaction.

The question arises, what was the effect of this correspondence? The first suggestion made on behalf of the seller is that this correspondence shows that there had been no concluded contract at all, inasmuch as it disclosed that the parties had never been *ad idem* as to the price. I cannot see how this can possibly be maintained. It might, no doubt, have been maintained if the buyers' letter of February 20 had been honestly written, and if it appeared on investigation that there was any honest misunderstanding as to the price. But, on the facts above stated, this was not so. There is no misunderstanding. The parties had been *ad idem*. Reference to the price as Rs. 34 was a mere subterfuge. It is, no doubt, a peculiar moral result that the buyer should ultimately be in a better legal position because his letter was a dishonest and not an honest one, but what we have to determine is a legal issue. The second suggestion made on this correspondence is that it shows that the negotiations had never reached finality. Reference is made to the doctrine of *Hussey v. Horne-Payne*.[1] I fail to see how that doctrine has anything to do with this case. That doctrine is that where a contract is concluded by correspondence, and a bargain seems to have been concluded at a certain point, but the parties go on corresponding, and show by their letters that neither understood that the bargain had been finally concluded, but that negotiations are still continuing, then there was in fact no concluded arrangement at the point supposed. I remember hearing Lord Esher once say of this proposition: "It is not an argument; it is an irresistible observation." But this doctrine has nothing to do with the present case. The facts show that there was a concluded agreement, and that one of the parties was dishonestly trying to get out of it. The third suggestion made at this stage is that the letter of February 20, in which the price was referred to as Rs. 34, was a repudiation of the contract. I am not at all sure that it constituted any such repudiation. A mere dishonest incidental suggestion that one term in the contract, however important that term, was not in fact the actual

[1] *(1879) 4 A. C. 311.*

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term agreed upon, is not itself a repudiation. If, when the matter is discussed, the contention is insisted on, and if it is stated either in express or implied terms that the persons raising it will not take delivery, or will otherwise not fulfil his part of the contract unless the contract is modified in accordance with his contention, then, no doubt, there would be a repudiation, but this stage was never reached. The other party at once in two letters denied the dishonest suggestion, and held the buyers to his bargain on the terms agreed. The buyers thereupon made no suggestion of refusing to take delivery, and no question of repudiation arose.

But even if it be accepted the suggestion that the letter of February 20 constituted a repudiation of the contract, the result is the same. The contract still subsists. A one-sided repudiation does not destroy it. Lord Esher in *Johnstone v. Milling* [1] states the law to be as follows:—

> "When one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not, of course, amount to a rescission of the contract, because one party to a contract cannot by himself rescind it; but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. He cannot, however, himself proceed with the contract on the footing that it still exists for other purposes, and also treat such renunciation as an immediate breach. If he adopts the renunciation, the contract is at an end, except for the purposes of the action for such wrongful renunciation. If he does not wish to do so, he must wait for the arrival of the time when in the ordinary course a cause of action on the contract would arise. He must elect which course he will pursue."

See also *Frost v. Knight* [2]:—

> "The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it, may be thus stated. The promisee, if he pleases, may treat the notice of intention as inoperative and await the time when

[1] *(1886) 16 Q. B. D. 460.*

[2] *(1872) L. R. 7 Exch 112.*

> the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it."

It seems clear, therefore, on the law so stated, that, at this point of the correspondence, there was subsisting a contract between the parties. This situation is clinched by the fact that the seller continued to keep the buyers' deposit of Rs. 7,500.

We now come to the third and final stage of the story. Three weeks after the letter of the buyers' proctor, which pointed out that the price of sugar was now decidedly above the original contract rate, the seller appears to have become affected by that consideration. The price of sugar had in the interval risen to Rs. 67 per bag. He realized that if the contract was to be performed, he would in fact suffer a loss, and that if the contract could be considered as out of the way, he could make a profit by disposing of the goods to someone else. He accordingly instructed his proctor on March 22 to write a letter of that date, in which the pretence was brought forward that the buyers had refused to pay for the goods at Rs. 37.50, and had already refused to take delivery. It notified the buyers that the seller was disposing of the goods " as stated in my letter of February 24." This statement ignores the fact that in the letter referred to the sale was threatened only in the event of the balance value not being paid and delivery taken. The letter further intimated that the seller " will dispose of the goods by private sale," and returned the deposit of Rs. 7,500. To this letter the buyers through their proctor replied on the same day, returning the deposit, declaring that they had already accepted the contract, which was delivered to them, and denying that they had ever refused to take delivery. They also announced that they had resold the sugar at a higher rate.

Let us examine the position at this point. The sugar, as a matter of fact, had not yet arrived. It had been sold for delivery in February, March, and April, but, as a matter of fact, did not arrive till April. There was nothing to prevent the contract being carried out. It was perfectly clear that the letter from the seller's proctor of March 22 was as dishonest as the buyers' letter of February 20. He desired now himself to repudiate the contract, and he sought an excuse for doing so in the false statement that the buyers had refused to take delivery at the contract rate. The question, therefore, at this point is this: The contract still subsisting, was the seller entitled to repudiate the contract, and to treat it as at an end

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without the consent of the buyer? To that the answer is explicit. Assuming that the letter of February 20 constituted a repudiation of the contract by the buyers, the seller definitely refused to accept that repudiation, and by so doing, to quote the words of Cochburn C.J. in *Frost v. Knight* (*supra*), "he kept the contract alive for the benefit of the other party as well as his own. He remained subject to all his own obligations and liabilities under it, and enables the other party to complete the contract, if so advised." See also the judgment of Collins M.R. in *Michael v. Hart & Co.*[1] If the letter of February 20 does not constitute a repudiation, still less is the seller himself entitled to repudiate the contract.

In the course of the argument reliance was placed upon a series of cases, on the basis of which it was contended that the letter of February 20 constituted a definite refusal to take delivery; that that refusal had never been retracted; and that consequently it remained open to the seller to treat that as a continuous refusal, and to accept it as putting an end to the contract at any time convenient to himself. It was pointed out that the buyers did not at any time withdraw their dishonest suggestion that the price of the sugar was Rs. 34; that they left the seller down to the last in a state of perplexity as to whether, if the sugar were delivered, more than Rs. 34 would be paid; it was even suggested that the letter written on behalf of the seller on March 24, if construed according to its terms, implied that the price of Rs. 37 was still insisted on; that, in view of the letter of February 20, the seller was entitled to a definite declaration as to whether Rs. 37.50 would be paid or not, and that, in the absence of such a declaration, he was entitled to treat the contract as at an end.

I will deal, first, with the facts, and then with the cases. It is, I think, undoubtedly, the case that the buyers and their proctor, with an over-astuteness that has come near to overreaching itself, studiously avoided putting in writing an undertaking to pay the price actually agreed upon. But too much importance need not be attached to this manœuvre. There was a document in existence which stated the actual terms of the bargain, and though the seller and his proctor had not that document in their possession, they were fully cognizant of its terms, as appears from their letters of February 21 and February 24. When the buyers' proctor on March 22 said that his clients had already accepted the contract, they knew perfectly well what was meant, and the affectation of ignorance in their letter of March 23 is entirely disingenuous. The suggested interpretation of the letter of March 24 as still embodying a contention that the price was Rs. 34 is merely interpretation by the card. All that the letter means is that the contract referred to is the contract asked for in the letter of February 23, which since that letter had now been received. It is as plain as it can be that the

[1] (*1902*) *1 K. B. 482.*

seller's proctor wrote his letter of March 22, not because his client was in a condition of perplexity, but because the price of sugar had gone up to Rs. 67 per bag.

The cases referred to are *Withers v. Reynolds*,[1] *Ripley v. M' Clure*,[2] *Byrne & Co. v. Van Tienhoven & Co.*,[3] *Cort v. Ambergate Railway Co.*[4] None of these cases seem to me in point. *Withers v. Reynolds* (*supra*) simply decided that where a buyer had intimated that he would not pay for goods on delivery in accordance with his contract, the seller was entitled to recover damages without previous tender of the goods. *Cort v. Ambergate Railway Co.* (*supra*) was, in effect, a further affirmation of the same principle. *Byrne v. Van Tienhoven & Co.* (*supra*)—in the latter part of the judgment—contains a passage which bears upon the subject, but that passage does not apply to the present facts. That passage is as follows:—

> "It was contended that by pressing the defendants to perform their contract, the plaintiffs treated it as still subsisting, and could not treat the defendants as having broken it . . . . But, when the plaintiffs found that the defendants were inflexible, and would not perform the contract at all, they had in my opinion, a right to treat it as at an end, and to bring an action for its breach. It would, indeed, be strange if the plaintiffs by trying to persuade the defendants to perform their contract were to lose their right to sue for its non-performance when their patience was exhausted . . . . I have found no authority to show that a continued refusal by the defendants to perform the contract cannot be treated by the plaintiffs as a breach of it by the defendants."

The principal case, however, is *Ripley v. M'Clure* (*supra*), which was a case in which a seller of a cargo of tea was entitled to sue for damages for refusal to receive it without having actually tendered the cargo. The material part of the decision in this case is thus formulated in *Cort v. Ambergate Railway Co.* (*supra*):—

> "It was held that a refusal by the defendant before the arrival of the cargo to perform the contract was not of itself necessarily a breach of it, but that such refusal, unretracted down to and inclusive of the time when the defendant was bound to receive the cargo, was evidence of a continuing refusal and a waiver of the condition precedent of delivery, so as to render the defendant liable for the breach of contract."

With regard to *Ripley v. M'Clure* (*supra*) my observation is this: that it does not apply to the present state of facts. In this case there was no continuous refusal down to the time for the performance of the contract. Some time before the sugar had arrived at Colombo,

[1] (*1831*) *2 B. & Ad. 882.*
[2] (*1849*) *4 Exch. 345.*
[3] (*1880*) *5 C. P. D. 344.*
[4] (*1851*) *17 Q. B. 127.*

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that is to say, by their letter of March 22, the buyers had insisted that they had already accepted the contract which was delivered to them, and denied that they had ever refused to take delivery. In view of that letter, it is impossible to say in this case that there had been " a continuous refusal down to and inclusive of the time when the buyers were bound to receive the cargo." The buyers were not bound to quote the terms of the contract which they declared that they had accepted. It was sufficient for them to identify it as the written contract which had been delivered to them. Moreover, the case of *Ripley v. M'Clure* (*supra*) must surely be read as subject to the doctrine developed in *Frost v. Knight* (*supra*) and subsequent cases, namely, that, where one party to a contract refuses to accept a repudiation from the other, and holds that other to his bargain, he keeps the contract alive for the benefit of both, and enables the other party to insist on the performance of the contract if he thinks fit.

So also the passage I have quoted from the judgment in *Byrne & Co. v. Van Tienhoven & Co.* (*supra*) must also be read subject to the doctrine of *Frost v. Knight* (*supra*). It is a question of fact in any case, whether a party to a contract elected to insist on the contract when he might have treated it as repudiated, and so kept it alive, or whether he merely pressed the other party to perform his contract, but found him continuously inflexible down to the time for its performance.

With regard to the suggestion that, owing to the uncertainty created in the mind of the seller, the buyers were bound to state explicitly whether they would pay Rs. 37.50 or not, I have no doubt that as between merchants this ought to have been done, but there is no legal authority for such a proposition. On the contrary, *Ripley v. M'Clure* (*supra*) is an express authority the other way. It is there stated that if the Judge at the trial had laid down such a proposition as law, it would certainly not have been correct.

The learned District Judge decided this case on the view that there never had been at any time a concluded contract. For the reasons I have given above, I must hold that he was wrong. He observes: " Plaintiff cannot approbate the contract when it suits him, and reprobate it when it suits him." *Frost v. Knight* (*supra*) shows that in the circumstances there considered this is exactly what he can do. That is to say, that in spite of the fact that he has sought to repudiate the contract, yet, if he is held to it by the other party, he may afterwards insist on its performance. I am further of opinion that nothing had happened to put an end to the contract which was, in fact, concluded.

I am therefore of opinion that the appeal should be allowed, with costs, and as there has been no finding as to the damages, the case should go back for inquiry on that point.

ENNIS J.—

This is an appeal from a decree dismissing the plaintiffs' action. The plaintiffs claimed Rs. 17,250 damages for breach of contract and Rs. 7,500 refund of advance on the contract. The defendant brought the sum of Rs. 7,500 into Court, and the contest was on the question of damages. The plaintiffs asserted in their plaint that the defendant in a writing dated February 16, 1923, agreed to deliver 150 tons of sugar at Rs. 37.50 per bag, or Rs. 375 per ton, in three shipments, in February, March, and April. The defendant in answer said that the plaintiffs, when the market price had fallen, pretended that he had not received the writing of February 16, 1923, and had asserted that the price agreed upon was Rs. 34 per bag, which was the price to be inserted in the contract yet to be signed. The defendant, therefore, set up in defence that there was no contract, and, in the alternative, that if there were a contract, the plaintiffs had repudiated it and were estopped from claiming the benefit of it.

At the trial the plaintiffs did not give evidence, but called the broker. The broker and the defendant were the only witnesses in the case.

The defendant's story was that the broker came to him on February 16 to buy sugar, and that he had with him the plaintiffs' cheque for Rs. 7,500 (being the customary advance of Rs. 5 per bag on 1,500 bags). After some negotiation as to price, the defendant signed the document of February 16, 1923, D 1, and took the cheque. The document P 1 is a receipt for Rs. 7,500, and it sets out the terms upon which the advance was received. The document clearly states that the price agreed upon between the broker and the defendant was at the rate of Rs. 37.50 per bag.

The broker's story at this point was that he took D 1 to the managing proprietor of the plaintiffs' firm (referred to in the evidence and hereafter as the plaintiff) the same day, and asked him for the "return contract." He was told to come the next day. The next day the plaintiff sent the broker back to arrange a lower price as the market price had fallen.

On February 20 the plaintiff wrote the letter D 2 to the defendant. In it he stated that the agreed price was Rs. 34 per bag, and said that he had not received the contract signed by the defendant, which he asked the defendant to send without further delay.

The broker's evidence was that the plaintiff had instructed him to buy at Rs. 37.50, and that he had taken the document D 1 to the plaintiff on February 16.

At this point in the case we are faced with two alternatives, either the broker's evidence that he was the plaintiff's agent duly authorized to buy at the rate of Rs. 37.50 and that he took the document D 1 to the plaintiff on February 16 is false; or, the plaintiff was thoroughly dishonest in writing the document D 2. If the broker is not to be relied upon, then the parties were not

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ad idem as to the price, and there was no contract. But the plaintiff gave no evidence, he does not explain how he came to write the letter D 2; there is, therefore, no reason to disbelieve the broker, and we are forced to the conclusion that the plaintiff was thoroughly dishonest when writing D 2. Can he claim to be in a better position ? The learned Judge has held not,—that he cannot both " approbate and reprobate " the contract, and must be bound by his letter D 2, and hence there was no contract.

The case does not, however, rest here, for the defendant, on February 21, wrote to the plaintiff D 3 pointing out that the agreed price was Rs. 37.50 ; and the plaintiff, through his legal adviser, wrote on February 24, D 4, and demanded a signed contract from the defendant as stated in the plaintiff's letter of February 20 (*i.e.*, a contract specifying the rate at Rs. 34). The letter D 4 of February 24 was, presumably, from the time which had elapsed, an answer to the defendant's letter D 3 of February 21, but the point is not clear. The defendant then wrote, through his legal adviser, the letter D 5 of February 24, in which he stated that the allegation that the price was Rs. 34 per bag was " false," and the defendant further said in effect that he would hold the plaintiff to the contract at Rs. 37.50.

It was contended on behalf of the defendant that the evidence proved a custom of the trade, and that for a complete contract there was to be a writing signed by the plaintiff, *i.e.*, the " return contract " referred to by the broker. This, however, was not the position taken up by the defendant himself in the letter D 5.

Shortly after the defendant wrote the letter D 5, the market price of sugar began to rise owing to a strike, and the plaintiff, through his legal adviser, wrote the letter D 6 on March 1, drawing the defendant's attention to the fact that the market price of sugar that day was Rs. 40 per bag. Why such a letter should have been written is a matter of conjecture, as the plaintiff had given no evidence. It could not have been merely to inform the defendant of a fact of which, he, as a trader, must have been well aware. It was suggested on behalf of the plaintiff that the plaintiff was jeering at the defendant's election to hold him to the contract. But if the letter was to have any legal or commercial effect, it may have been an invitation to the defendant to take advantage of the price and sell the sugar, so that there would be no occasion to claim damages from the plaintiff. In any event, it is significant that the letter is silent as to whether the plaintiff accepted the position that the agreed price per bag was Rs. 37.50, and its silence in this respect was as misleading and dishonest as the written statement in D 2.

The next letter was from the defendant on March 22, D 8, returning the advance Rs. 7,500, and saying that as the plaintiff refused to pay at the price of Rs. 37.50 and take delivery, the defendant was disposing of the sugar, and that there would be no likelihood of loss or occasion to claim damages.

This was promptly followed by a letter D 8 from the plaintiff written the same day, saying that the plaintiff had already accepted the contract " which was delivered to them " and had resold the goods at a higher price. The letter concluded with a statement that owing to strikes the price of sugar was that day Rs. 67 per bag.

It appears from an endorsement on the document of February 16 which was filed with the plaint that this sale by the plaintiff was effected on March 14, but the fact has not been proved.

On March 23 the defendant replied by D 9 to the plaintiff's letter, D 8, again asking what the contract was which was referred to as having been delivered, and saying—

> " I am not sure whether even now you admit that your statement that you agreed to pay Rs. 34 only is false and that you did agree to pay Rs. 37.50."

To this the plaintiff replied by D 10 through his lawyers—

> " With reference to your letter of the 23rd instant, I would refer you to my first letter (D 4) dated February 23 last in respect of the above, and in terms of that your client has returned to my client the contract referred to therein."

An examination of this letter shows that the plaintiff was again evasive. It (1) refers the defendant to the plaintiff's letter D 4, which in turn refers the plaintiff's dishonest letter D 2 ; and (2) suggests that the defendant has returned the contract " referred to therein." Now the contract referred to in D 2 was one at Rs. 34 per bag. But the contract which the plaintiff had in his possession was the document D 1 of February 16, which had been handed to the broker on February 16 and delivered by the broker to the plaintiff the same day, setting out that the price was Rs. 37.50. In other words, the letter D 10 leads back to both D 1 and D 2.

Throughout the correspondence the plaintiff has nowhere accepted the defendant's contention that the agreed price was Rs. 37.50. It is not until we come to the plaint in the present action that this position is accepted.

The correspondence shows that the plaintiff had denied in D 2 a material term of the contract, and had met the defendant's efforts to find out whether he agreed that the price was Rs. 37.50 by silence and the incomprehensible letter of March 1. The market was fluctuating, and at any moment before delivery the price might have fallen through the abatement of the cause of the high price, and this may have been the reason for the plaintiff's silence.

It was urged on behalf of the plaintiff that the defendant's letter D 5 was an election not to rescind the contract, but to keep it open, and that it could be kept open only for the benefit of both parties. This argument, it seems to me, would have been tenable had the contract been voidable rather than void. But the conduct of the plaintiff in denying the most material term of the contract was,

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in effect, an assertion that the contract was void. He did not retract from that position even after the defendant had written that he would hold him to the contract, but wrote the extraordinary letter of March 1.

I find a difficulty in applying any of the cases arising on the rights of parties on the refusal of one to perform, or, on some slight dispute as to the terms of a contract, because the facts in this case are different. In *Withers v. Reynolds*,[1] where one party to the contract, under which straw was to be delivered by instalments, refused to pay for the loads of straw on delivery, it was held that the other party was not obliged to go on delivering. In *Ripley v. M' Clure* (*supra*), where the defendant agreed to buy, on the arrival of a certain ship, one-third of a cargo of tea, it was held that the refusal of the defendant, before the arrival of the ship, to perform the contract was not a breach of it ; and that a mere refusal to perform, declared beforehand, may be retracted, but if it remains down to the time of the performance unretracted, the other party to the contract was entitled to treat as a breach, as it was a continuing refusal and a waiver of the condition precedent of delivery. In *Withers v. Reynolds* (*supra*) and in *Ripley v. M'Clure* (*supra*) the decision rested on the right of one party to rescind a voidable contract, and this, it seems to me, distinguishes the present case from all such cases. In the present case the position taken up by the plaintiff was such that, if *bona fide*, the contract was void, and not merely voidable. It was not a mere refusal to pay, but a denial deliberately and dishonestly made that the price was at the rate of Rs. 37.50 per bag, and the evidence shows that this position was persisted in even after the defendant's letter D 5 was written. The denial of the price evidenced by D 2 and D 4 was never retracted, and the plaintiff's silence on the point in D 6 led the defendant to believe that the plaintiff still denied that the price agreed upon was Rs. 37.50. The denial was an assertion that there was no *consensus ad idem*, and hence no contract. On the evidence in the case, it is clear that there was a contract as stated by the defendant, and that the plaintiff's conduct was a dishonest attempt to obtain a reduction in price (the reduction the plaintiff wished to secure was considerable, it works out at 9¼ per cent., or Rs. 5,250 on the whole contract). The plaintiff's attitude in D 2 and D 4 leads to the inference that the broker had no authority to contract at Rs. 37.50, and it was a denial of fact which struck at the very existence of the contract. It was not a mere declaration of intention not to pay on delivery. It was a misrepresentation of fact which would leave the defendant free to avoid a loss when opportunity occurred, and give rise to an estoppel under section 114 of the Evidence Ordinance.

In my opinion the learned Judge rightly dismissed the action on the ground that the plaintiff was precluded by his conduct from setting up the claim.

[1] *(1831) 2 B. & Ad. 882.*

Looking at the case with reference to the principles of the law of contract, "the true question," according to Lord Coleridge C.J. in *Freeth v. Burr*, [1] "is whether the acts and conduct of the party evince an intention no longer to be bound by the contract. Now, non-payment on the one hand, and non-delivery on the other, may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract and set the other free." In the present case we find that the acts and conduct of the plaintiff evinced a dishonest intention not to be bound by the contract, the defendant was therefore free, and, in my opinion, the defendant was not bound even after his letter D 5, unless the plaintiff had definitely accepted the contract thereafter, or there were circumstances from which the defendant might reasonably conclude that the plaintiff had accepted. The plaintiff had an opportunity to accept on receipt of the defendant's letter D 5. He did not do so, but wrote the ambiguous letter D 6. From such a letter and in favour of such a man as the plaintiff there could be no presumption in the plaintiff's favour. The letter can be read only as a persistence in his conduct of misrepresenting the real contract, and therefore amounted to a fresh repudiation of the contract. That the plaintiff sold the goods to a third party has not been proved. That he communicated the fact of sale to the defendant, or that the defendant knew that the plaintiff sold the goods on the basis of the real contract, has not been established in the evidence, so there is no circumstance from which a presumption in favour of the plaintiff can be drawn. I am of opinion, therefore, that the defendant was free to treat the contract as abandoned, which he did.

I would accordingly dismiss the appeal, with costs.

JAYEWARDENE A.J.—

The facts leading up to this litigation have been fully set out in the judgments of the other members of this Court, and it is unnecessary to repeat them here.

At the first argument of this appeal before my Lord the Chief Justice and myself, the dishonesty of the plaintiffs in the transaction under consideration appeared to me so gross and palpable that I felt it impossible to say that the claim of the plaintiffs had not been rightly dismissed by the learned District Judge.

The second argument before a fuller Court has not convinced me that the opinion that I then formed was wrong ; on the other hand, it has provided further grounds for supporting the view I first entertained.

Two questions arise for decision : First, was there a binding contract entered into between the plaintiffs and the defendant ? and second, even if there had been such a contract, has there been a

[1] *(1874) 9 C. P. 208.*

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repudiation of it by the plaintiffs and an acceptance of such repudiation by the defendant, with the result that the contract originally entered into between the parties has been rescinded ?

In my humble opinion the first question must be answered in the negative, and the second in the affirmative. It may be that in law a valid contract of the sale was constituted as soon as the defendant gave the writing D 1 and received the plaintiffs' cheque for Rs. 7,500 as an advance on the price, but it seems to me clear that the defendant did not consider the contract as concluded until he received a writing from the plaintiffs agreeing to buy the sugar at Rs. 37.50.

In his evidence the defendant said:—" It is the custom to expect another similar document, and I did not deliver the sugar because the broker did not bring back a contract from Noorbhai signed by Noorbhai."

" Even after I made the endorsement I asked him (the broker) for the plaintiffs' document. I never got the document from the plaintiffs." And again : " It is not the case that when I get an advance I do not get a writing from the broker. I never deal without a written contract."

The broker, the plaintiffs' agent, himself says: " I asked the (first) plaintiff for a return contract to be given to the defendant, and he asked me to come the next day. I went the next day and asked the plaintiff for the return contract, and then he said the price is gone down and asked me to go back to the Chetty (defendant) and try to arrange a lower price." And again: " Some firms give a written contract and some do not. Plaintiffs have been giving a return contract to some people. *Defendant wanted a written contract.*"

What the defendant got was, not a return contract agreeing to buy at Rs. 37.50 a bag, but a letter (D 2) stating that the plaintiffs had agreed to buy the sugar at Rs. 34 a bag. The broker in this transaction was the agent of the plaintiffs.

He had agreed to pay at the rate of Rs. 37.50 a bag, but, on the other hand, the principal himself had intervened and had written to say that the contract price was Rs. 34 a bag. This was a clear repudiation of the broker's agreement to buy at Rs. 37.50 a bag, and according to the (first) plaintiff D 2 was written before he had received D 1.

In these circumstances it would have been unwise and unsafe for the defendant to proceed upon the basis that the plaintiffs had agreed to pay Rs. 37.50 a bag. The principal's distinct statement that the price was Rs. 34 must be taken to override the agent's statement that the price was Rs. 37.50.

At that stage of the transaction could the defendant have insisted on the contract being enforced on the basis that the price was Rs. 37.50 ? I think not. If the defendant had carried out his part of the agreement and insisted upon the payment of the price

at Rs. 37.50, the plaintiffs could easily have met his demand by saying that the broker, their agent, had been labouring under a mistake, and that they, the principals, had expressly stated that the price was Rs. 34 a bag. These facts show that there had been no agreement between the parties as regards the price, one of the essential terms in a contract of sale. It is impossible to draw a line at the stage at which the defendant gave D 1 and received the cheque, but the subsequent letters relating to the transaction and the conduct of the plaintiffs must also be considered in deciding whether a concluded contract had been entered into especially as the defendant expected a letter from the plaintiffs concerning the sale.

In *Hussey v. Horne-Payne* (*supra*), the House of Lords laid down a principle which is applicable to contracts of all kinds, including contracts for the sale of goods, and therefore to the facts of this case.

There Earl Cairns, Lord Chancellor, said:—

> "You must take into consideration the whole of the correspondence which has passed. You must not at one particular time draw a line and say: 'We will look at the letters up to this point and find in them a contract or not, but we will look at nothing beyond.' In order fairly to estimate what was arranged and agreed, if anything was agreed between the parties, you must look at the whole of that which took place and passed between them."

And Lord Selborne (p. 323) said:—

> "The observation has often been made that a contract established by letters may sometimes bind parties who, when they wrote those letters, did not imagine that they were finally settling the terms of the agreement by which they were to be bound; and it appears to me that no such contract ought to be held established even by letters which would otherwise be sufficient for the purpose, if it is clear, upon the facts, that there were other conditions of the intended contract, beyond and besides those expressed in the letters, which were still in a state of negotiation only, and without the settlement of which the parties had no idea of concluding any agreement."

In the present case the defendant did not consider the contract as concluded until he received a writing from the plaintiffs, and the writing he received showed that the plaintiffs had not agreed to pay the price their agent had agreed to pay.

There was, therefore, in my opinion, no binding contract entered into between the parties. Against this it is argued that at a later stage (*vide* D 5) the defendant treated the contract as binding, and threatened to recover from the plaintiffs damages for breach of contract.

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In many cases where parties have sued upon the basis of a binding contract, the Courts have held that there has been no valid contract between them. The fact that the defendant threatened to recover from the plaintiffs damages for breach of contract cannot constitute a contract if there was no contract in fact or in law.

There is no question of estoppel, and it is for the Court to decide, on a consideration of all the facts, whether there was a contract or not, independently of what the parties themselves might have thought. I have no doubt that if the defendant had instituted an action for damages for breach of contract, the plaintiffs could have successfully resisted his claim. As I said, the first question must be answered in the negative.

Even assuming that there had been a valid contract, was the contract repudiated by the plaintiffs, and was such repudiation accepted by the defendant? This question is involved in the second and fourth issues framed at the trial. That there was a repudiation is clear. The plaintiffs were not prepared to carry out one of the most important terms of the contract, that is, to pay the price agreed upon.

The defendant accepted this repudiation by letter D 7. But it is said that the repudiation came too late, as by his letter D 5 the defendant had treated the contract as subsisting after the plaintiffs' repudiation of it. It is argued that as the defendant instead of accepting the repudiation had insisted on treating the contract as binding, it is not open to him to accept the repudiation thereafter—even though the repudiation had remained unretracted. I am unable to accede to this contention. In my opinion, so long as the repudiation remained unretracted, it was open to the other party to accept it.

By D 2, which contains a string of calculated falsehoods deliberately inserted to provide them with a defence if sued on the contract, the plaintiffs stated that the contract was to buy at Rs. 34 a bag. In D 3 the defendant pointed out that the price was Rs. 37.50 a bag, and asked plaintiffs to pay the balance and take delivery as arranged.

He also asked the plaintiffs to send him a contract duly signed by them without further delay. The plaintiffs replied by D 4 through their lawyer. The points at issue were ignored, but attention was drawn to D 2, and a contract signed by the defendant was requested. Long before this date the contract D 1 signed by the defendant had been in their hands. The defendant replied by D 5, and stated that the statement in D 2 that the price per bag was Rs. 34 was false, and that D 1 had been handed before the cheque for Rs. 7,500 was received, and that the plaintiffs were attempting to cut down the price as the market fell after the contract. It concluded with a threat, that unless the balance was paid and delivery taken as arranged, the goods would be sold at the plaintiffs'

risk, and the losses and damage, if any, recovered. This letter contained a serious charge against the plaintiffs, but they, in their reply, D 6, ignored the charges, and merely stated that the price of sugar had gone up to Rs. 40.

By D 7, writen some days later, the defendant informed the plaintiffs that owing to their refusal to pay at the rate of Rs. 37.50 a bag and take delivery he was disposing of the goods. He also added that he was returning the plaintiffs' advance of Rs. 7,500 in view of the fact that no damages were likely to result owing to the rise in the price of sugar.

This is the letter by which the defendant accepted the plaintiffs' repudiation of the contract. It is clear that up to that point the plaintiffs had not withdrawn their repudiation, and confirmed their broker's agreement to pay at the rate of Rs. 37.50 a bag.

No doubt in D 5 the defendant had treated the contract as a completed contract, but the plaintiffs had not withdrawn their repudiation. There was a continuing breach of the contract on the part of the plaintiffs up to the time of the acceptance of the repudiation by the defendant by D 7.

I may here quote what Lord Campbell said in *Cort v. Ambergate Railway Co.*[1]:—

> "The most recent case cited by the defendant's counsel was *Ripley v. M'Clure (supra)*. This case is very complicated in its circumstances; but the second point decided in it is the only one applicable to the question which we have to consider. There being an executory contract, whereby the plaintiff agreed to sell and the defendant to buy, on arrival, certain goods, to be delivered at Belfast at a certain price, payable on delivery, it was held that a refusal by the defendant before the arrival of the cargo to perform the contract was not of itself necessarily a breach of it, but that such refusal, unretracted down to and inclusive of the time when the defendant was bound to receive the cargo, was evidence of a continuing refusal and a waiver of the condition precedent of delivery, so as to render the defendant liable for the breach of contract. But, in the case at Bar, the refusal was never retracted, and therefore there was a continuing breach down to the time when this action was commenced."

This statement of the law must be read with the modification subsequently introduced by *Frost v. Knight*,[2] that upon repudiation an action may be brought *at once* as on a breach of contract.

At the date this letter D 7 was written the defendant could, in my opinion, have treated the plaintiffs' refusal to pay Rs. 37.50 a bag as a breach of the contract by them and sued for damages. If

[1] *(1851) 17 Q. B. 127 (147-148) ; 117 English Reports, 1,237.*
[2] *(1872) L. R. 7 Exch. 111.*

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he could have done so, there is no reason why the defendant could not have treated the breach as a repudiation and accepted it as such. There has been no waiver of the breach by the defendant.

In *Bryne & Co. v. Leon Van Tienhoven & Co.* (*supra*) Lord Lindley (then Lindley J.) said at p. 350:—

> "But when the plaintiffs found that the defendants were inflexible, and would not perform the contract at all, they had, in my opinion, a right to treat it as at an end, and to bring an action for its breach. It would, indeed, be strange if the plaintiffs by trying to persuade the defendants to perform their contract were to lose their right to sue for its non-performance when their patience was exhausted. The authorities referred to by Mr. Benjamin (viz., *Avery v. Bowden*[1] and others of that class) show that as the plaintiffs did not, when the defendants first refused to perform the contract, treat that refusel as a breach, the plaintiffs cannot now treat the contract as broken at the time of such refusal. But I have found no authority to show that a continued refusal by the defendants to perform the contract cannot be treated by the plaintiffs as a breach of it by the defendants. On the contrary, *Ripley v. M'Clure* (*supra*) and *Court v. Ambergate, &c.* (*supra*) show that the continued refusal by the defendants operated as a continued waiver of a tender of bankers' acceptances and enable the plaintiffs to sustain this action. In the present instance it is not necessary to determine exactly when the contract can be treated by the plaintiffs as broken by the defendants. It is sufficient to say that whilst the plaintiffs were always ready and willing to perform the contract on their part, the defendants wrongfully and persistently refused to perform the contract on their part; and before action there was a breach by the defendants not waived by the plaintiffs."

There is no authority which exactly covers this case, nor is there any authority opposed to the view I have expressed; on the other hand, the principles laid down in the cases I have referred to, and others dealing with the repudiation or abandonment of contracts, appear to support it.

There is, however, another view to be taken of the rights of the parties. The goods had been imported by the defendant on *c.i.f.* terms, and he could have disposed of the goods by selling the documents. The repudiation of one of the agreed terms of the contract—an essential term of it—by the plaintiffs amounted to an anticipatory breach of the contract.

[1] *(1855) 5 E. & B 714.*

On February 24, when the defendant wrote D 5 to the plaintiffs, he was entitled to sue for and recover damages consequent on such breach (*Ogg v. Shuter* [1]).

But the law casts on the seller in such a case the duty of minimizing the damages resulting from a breach of contract to purchase (*Roth v. Tayson* [2] and *Jamal v. Moola Dawood Sons & Co.*[3]).

The defendant was therefore justified in selling the sugar when the market was favourable, and giving the defaulting purchaser the benefit of such sale. If the market had subsequently dropped, the defendant might have been held responsible for not selling when a favourable opportunity offered itself. This is exactly what the defendant has done in this case. By his sale of the goods when the market had risen, he has freed the plaintiffs from their liability to pay any damages. He has also returned to them the deposit, which he need not have done.

In my opinion, therefore, the judgment appealed from must stand, and I agree with my brother Ennis that this appeal should be dismissed, with costs.

Appeal dismissed.